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Supreme Court, U.S.
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No. 03-21

In The
Supreme Court of the United States

CHAUNCE WINDLE,

Petitioner,

vs.

CITY OF MARION, INDIANA, a municipal corporation, by and through the City of Marion and SERGEANT ROBERT RAYMER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' CITY OF MARION, INDIANA AND SERGEANT ROBERT RAYMER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

Respondents, the City of Marion, Indiana, a municipal corporation, by and through the City of Marion ("the City of Marion") and Sergeant Robert Raymer ("Sgt. Raymer"), disagree with the statement of the questions presented for review in Chaunce Windle's ("Windle") Petition for Writ of Certiorari. Instead, the questions presented for review are these:

1. Whether the Seventh Circuit Court of Appeals correctly affirmed summary judgment in favor of Sgt. Raymer on Windle's failure to protect claim by applying the general rule articulated by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197, 109 S.Ct. 998, 1004, 103 L.Ed.2d 243 (1989), that a "state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," where the evidence is uncontroverted that Sgt. Ramer took no affirmative action to place Windle in a position of danger or increase the risk of danger presented to Windle at the hands of her abuser, Carol Rigsbee ("Rigsbee").

2. Whether the Seventh Circuit Court of Appeals correctly affirmed summary judgment in favor of the City of Marion on Windle's municipal liability claims where there was no underlying constitutional violation by Sgt. Raymer and the "shocks the conscience" substantive due process theory from *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) is inapplicable to failure to protect cases.

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II.

THE PETITION MISREPRESENTS THE UNDERLYING FACTS

The respondents disagree with the Statement of the Case presented by Windle as it grossly misrepresents and distorts the underlying facts in an effort to persuade this Court to grant certiorari. The most glaring misstatements woven throughout the Petition are the repeated assertions that "the defendants" failed to act to protect Windle from harm and prevented unidentified others from intervening on her behalf to extricate her from the situation.

Windle ignores, and apparently wants this Court to ignore, that the only named individual defendant is Sgt. Raymer. As Sgt. Raymer is the only individual defendant, this Court's sole focus should be upon his conduct. Whether the Seventh Circuit Court of Appeals correctly applied the general rule of *DeShaney v. Winnebego County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 243 (1989), that government actors are not liable under 42 U.S.C. §1983 for simply failing to protect a citizen from private acts of violence, lives or dies based exclusively upon what Sgt. Raymer did or did not do. As there are no other individually-named defendants, anything other officers did or did not do is irrelevant and cannot be considered in addressing the merits, or lack thereof, of the Petition for Writ of Certiorari. The facts of this case, as accurately stated by both the District Court and the Seventh Circuit Court of Appeals, plainly demonstrate that Windle failed to point to a single affirmative act on Sgt. Raymer's part that created a danger or enhanced the danger Windle was already admittedly in.

Second, Windle misrepresents the underlying facts by repeatedly asserting that Sgt. Raymer and other officers,

who are not named defendants in this case, engaged in affirmative conduct or misconduct, choosing to not characterize the conduct as failure to act or inaction, for which there is clearly no constitutional claim. This semantic trickery is unavailing.

Neither the District Court nor the Seventh Circuit fell into the trap Windle attempted to set. The District Court made the following observations in rejecting Windle's efforts:

> Doe appears to agree with the general principal that substantive due process requires some affirmative act by a state actor. In fact, she attempts to frame her response by using this terminology. For instance, she repeatedly states that the "affirmative act" in this case is the failure of Raymer and others to act . . . Whether the failure of the Defendants to act as alleged by Doe can be classified as an "affirmative act" by the state is an interesting question. *Yet, the real question posed by the parties' arguments is whether Raymer or the City used their authority to create a danger or render the plaintiff more vulnerable to a danger than she otherwise would have been.*
>
> * * *
>
> *Here, there is nothing in the record which suggests that the Defendants created the situation between Rigsbee and the plaintiff.* Indeed, by plaintiff's own admission the relationship between herself and Rigsbee was abusive well before police heard the suspicious cellular telephone conversations between the two. *Thus, Raymer's acts or omissions did not increase the risk of injury beyond what it would have been had Raymer not intervened at all. Doe v. City of Marion*, 196

F.Supp.2d 750, 756-758 (N.D.Ind. 2002) (Emphasis added).

The Seventh Circuit Court of Appeals also soundly rejected Windle's efforts to articulate an affirmative "failure to act" claim.

> . . . Appellant attempts to show that Raymer took an affirmative action, even though he plainly did not. She characterizes Raymer's inaction as an affirmative choice, using phrases like "affirmatively choosing to stand idle" and "affirmatively chose not to take action" throughout her brief. We find this line of argument lacking and not in accord with our understanding of "taking an action affirmatively."
>
> *Even if one were to construe the conduct of the officers as some sort of affirmative action, we must then ask what new danger would have otherwise befallen the victim.* If Raymer, under Appellant's theory, had not taken the so-called affirmative action of doing nothing and had done something, we have no way of knowing what would have occurred. Indeed, the police might have failed at protecting Chaunce. We therefore have no assurance that the danger would not have existed in the absence of the so-called affirmative action of doing nothing.
>
> In focusing exclusively on whether the police acted affirmatively, *Appellant fails to grasp that she has to establish that the police failed to protect her from a danger* ***they created or made worse****. She confuses the inert failure to protect with the proactive creation or exacerbation of danger. In this case the police did nothing to create a danger, nor did they do anything to make worse any danger Chaunce already faced . . . .*

Windle v. City of Marion, 321 F.3d 658, 661-662 (7th Cir. 2003) (Emphasis added).

To further skew the facts, Windle argues on several occasions that Sgt. Raymer informed his superior officer, Lieutenant Alter-Dunn ("Lt. Dunn"), that he reported the abuse to the local prosecutor when he had in fact not yet done so. This is a red herring for several reasons. First, Sgt. Raymer's incident report is dated December 2, 1997, written approximately one week after Rigsbee admitted her molestation of Windle on November 25, 1997. As Sgt. Raymer's report was written after the alleged abuse ceased, it cannot be utilized by Windle to support her affirmative conduct claim. Moreover, Windle fails to explain how not reporting the alleged abuse to the prosecutor, if this is in fact what Sgt. Raymer did, amounts to affirmative conduct which placed Windle at an increased risk of harm, or amounts to conduct which prevented other officers from intervening on Windle's behalf. Again, the timing of the incident report is *after* the abuse ceased.

Windle also states that Lt. Dunn allegedly dissuaded other officers from intervening by telling a subordinate officer "there was nothing they could do because they had obtained the information by illegal intercept. Her words were viewed as a directive not to intervene." (Petition for Writ of Certiorari at p. 3). Officer Gary Henderson, who is not a party to this lawsuit, testified in his deposition that he was concerned about the conversations he overheard between Windle and Rigsbee and was upset when told that there was nothing that could be done about the situation. No matter how Windle attempts to twist the underlying facts, this testimony does not demonstrate affirmative conduct on the part of Sgt. Raymer which enhanced the danger to Windle. Moreover, the Seventh Circuit Court of

Appeals properly rejected Windle's argument that officers were dissuaded from protecting her, noting that this argument was mentioned only in passing in Windle's Reply Brief and was not pursued by her in the Court below. *Windle*, 321 F.3d at 662, n.3.

In addition, Windle ignores the fact that even if Lt. Dunn made comments to a subordinate about not doing anything to address the situation, she is not a named defendant in this case and was not a final policymaker for the City of Marion. Indeed, the District Court held that Windle failed to present any evidence that Lt. Dunn was "a policymaker as opposed to an individual who enforces City policy made by others," and therefore Windle failed to raise any genuine issue of material fact as to Lt. Dunn's status for purposes of municipal liability. 196 F.Supp.2d at 760.

III.

REASONS FOR DENYING THE WRIT

A. The Decision Below Is Not In Conflict With The Decisions Of Other Circuits

In *DeShaney*, *supra*, the Supreme Court held that the State has no constitutional duty to protect a child against abuse. 489 U.S. at 202, 109 S.Ct. at 1007. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. at 1003. Rather, the purpose of the Due Process Clause is to protect people from the State, not to require the State to protect individuals from each other. *Id.* at 196, 109 S.Ct. at 1003. The Supreme Court emphasized that the Due Process Clause is "phrased as a limitation on the State's

power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195, 109 S.Ct. at 1003.

The *DeShaney* Court explained the facts of the case as "undeniably tragic." *Id.* at 191, 109 S.Ct. at 1001. The Winnebago County Department of Social Services received numerous reports that a four-year-old child, Joshua DeShaney, was being abused by his father. The abuse continued and local officials even personally observed the injuries inflicted upon Joshua by the father. They knew firsthand of the threat to the child's safety, yet failed to remove him from the father's custody or take other measures to protect him from abuse. The father beat Joshua so severely that he was left profoundly retarded for life. Joshua and his mother sued state and local officials, alleging a deprivation of the child's liberty without substantive due process by failing to intervene to protect the child from the father's violence and abuse.

While expressing its natural sympathy for Joshua's plight, the Supreme Court held that there was no §1983 liability under the circumstances. The Court wrote that a "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. at 1004. Simply knowing about a person's precarious situation vis-à-vis another private party does not invoke any obligation on the part of the state actor to come to the person's aid.

In dicta, the *DeShaney* Court suggested a conceivable exception to the general rule of non-liability if the State actor plays a role in creation of the danger. In a single sentence, which is nothing more than a passing reference, the Court wrote: "While the State may have been aware of the dangers that Joshua faced in the free world, it played

no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201, 109 S.Ct. at 1006.

Although state and local officials were well aware of the abuse that Joshua was suffering at the hands of his father, any creation of danger exception afforded no relief as the *DeShaney* Court held that the officials' conduct in standing by and doing nothing did not affirmatively create a danger or render Joshua more vulnerable:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive compensation for the grievous harm inflicted upon them. *But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. Id.* at 202-03, 109 S.Ct. at 1007. (Emphasis added).

Relying upon the vague "creation of danger" dicta in *DeShaney*, Circuit Courts have created a narrow limited exception to the general rule of non-liability for failure to act articulated in *DeShaney*. This narrow exception, referred to as the "state-created danger exception," provides that the state may be liable for failing to protect a person from harm by a private individual if the State itself affirmatively creates or enhances the risk of harm.

After rejecting Windle's efforts to construe the record as showing affirmative conduct on Sgt. Raymer's part, rather than mere inaction, the Seventh Circuit Court of Appeals held that the facts of the case were "indistinguishable" from

DeShaney and therefore applied *DeShaney's* guiding principle of no constitutional liability for failure to protect Windle from molestation by Rigsbee. 321 F.3d at 662. The Court concluded that there was no evidence that Sgt. Raymer's failure to intervene earlier proactively created or exacerbated Windle's danger at the hands of her abuser. *Id.* The Court wrote as follows:

> This case is indistinguishable from *DeShaney* where the Supreme Court concluded that no constitutional violation had occurred when State actors who may have been aware that a child was being abused by his father did nothing to protect the child. 321 F.3d at 662.

The Seventh Circuit Court of Appeals' conclusion echoes the sentiments of the District Court that "there is nothing in the record which suggests that the Defendants created a situation between Rigsbee and the plaintiff." 196 F.Supp.2d at 758. As the relationship between Windle and Rigsbee was abusive long before any officer overheard a single telephone conversation, the District Court concluded that "Raymer's acts or omissions did not increase the risk of injury beyond what it would have been had Raymer not intervened at all." *Id.* The District Court's conclusion is fully supported by the evidence:

> Here, the Defendants, and specifically Raymer, made no false promise of protection to Doe (and she never requested protection from the police), nor did the Defendants or Raymer do anything to create or exacerbate the situation between Rigsbee and Doe. Raymer simply stood by and permitted the status quo to continue until he had information from which he could identify Jane Doe. In the course of his investigation, Raymer did not, for instance, knowingly place Doe in a position

> where Rigsbee would have additional access or opportunity to continue the molestation. In fact, the police had no contact whatsoever with Doe or Rigsbee until November 25. Any access Rigsbee had to Doe prior to the time occurred without any police intervention or aid. Accordingly, the court cannot conclude that Raymer imperiled Doe by failing to intervene sooner. 196 F.Supp. at 758-59.

Despite an absolutely correct application of *DeShaney* by both the Seventh Circuit Court of Appeals and the District Court, Windle attempts to entice this Court to accept her case by arguing that the Seventh Circuit's formulation of the state-created danger exception is in conflict with the decisions of other Circuits, namely, the Third, Fifth, Sixth and Tenth Circuits. To be blunt, this is a false proposition. While various Circuits articulate slightly different tests to determine whether the state created a danger for which it may be liable under 42 U.S.C. §1983, common threads run through each test. The Circuits uniformly agree that *DeShaney* clearly establishes that the failure of a state to protect citizens from private violence does not give rise to a due process claim. However, most Circuits which have addressed the issue also recognize a very limited exception to this general rule exists where the state affirmatively places an individual in a position of danger, makes the individual more vulnerable at the hands of the third party, or increases the risk that the individual might be exposed to private acts of violence. Those Courts acknowledging this narrow exception require that the official act affirmatively as opposed to inaction or refusing to act. This stringent requirement arises from *DeShaney's* admonition that the Due Process Clause does not require the government to protect citizens from other

citizens and therefore the government cannot be held liable for failing to protect an individual from private violence.

Windle conveniently ignores that **all** Circuits agree that the state-created danger exception requires affirmative conduct on the part of government actors. *See e.g., Sargi v. Kent City Board of Education*, 70 F.3d 907, 913 (6th Cir. 1995) (liability under the state-created danger theory must be predicated on the state's affirmative acts which work to plaintiff's detriment in terms of exposure to danger to which plaintiff was not already exposed); *Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995), *cert. denied*, 516 U.S. 994, 116 S.Ct. 530, 133 L.Ed.2d 436 (1995) (cases which recognize liability "involved some circumstance wherein the state took a much larger and more direct role in 'creating' the danger itself. . . . In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993), *cert. denied*, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993) (explaining that a plaintiff "may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger tha[n] they otherwise would have been"); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993) ("the Due Process Clause imposes a duty on state actors to protect or care for citizens . . . when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced."); *L.W. Grubbs v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113

S.Ct. 2442, 124 L.Ed.2d 660 (1993) ("the 'danger creation' basis for a claim . . . involves affirmative conduct on the part of the state in placing the plaintiff in danger."); *D.R. v. Middle Bucks Area of Vocational Technical School*, 972 F.2d 1364, 1374-75 (3rd Cir. 1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993) ("liability under the state-created danger theory is predicated upon the states' affirmative acts" and cases applying the theory find that the state "affirmatively acted to create the danger to the victims"); *McComb v. Wambaugh*, 934 F.2d 474, 483 (3rd Cir. 1991) (holding that *DeShaney* prevented recovery because local social workers had not created the danger of private abuse).

Windle relies upon *Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002) which involved the question of whether an officer's failure to serve an ex parte order of protection upon an ex-husband created or increased the danger posed to the plaintiff by her ex-husband. There was evidence that the Sheriff's Department had actual knowledge of domestic problems and violence between the individuals. Despite this knowledge, the Court found *DeShaney* controlling and held that as there was no factual support for the claim that the officers created or enhanced a danger to the ex-wife by failing to serve the order in a timely manner, she could not recover under the state-created danger exception.

Part of the Sixth Circuit's test includes demonstration by the plaintiff that he or she faced a "special danger" by virtue of the state's conduct, rather than a risk or danger to which the public at large is exposed. 296 F.3d at 430. Windle argues that had the Seventh Circuit considered this particular element, the record supports the conclusion that she was placed at a specific risk, rather than a risk to

the public at large. However, the record does not support this argument. While children are unfortunately at risk of being abused by third parties, there was no affirmative conduct on the part of Sgt. Raymer which created a particular danger to Windle not shared by the juvenile public at large. Windle's result would not be different under the Sixth Circuit test.

Windle also cites *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001), *cert. denied*, 534 U.S. 1019, 122 S.Ct. 543, 151 L.Ed.2d 421 (2001), wherein the Court articulated a six-part test to determine if a defendant created a special danger to support liability under the state-created danger exception. The Tenth Circuit test is also of no benefit to Windle as she once again cannot satisfy the crucial element: that Sgt. Raymer either created the danger or increased the danger in some way. Despite her attempts to construe the record to the contrary, there simply is no evidence that Sgt. Raymer took any affirmative action which placed Windle in harm's way at the hands of her abuser, Rigsbee.

The Tenth Circuit's formulation also requires Windle to demonstrate a degree of outrageousness and a magnitude of potential harm that is truly conscience shocking, which requires, at the very least, a high level of outrageousness. *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). The facts of this case fall far short of satisfying this stringent standard.

Windle also ignores the Tenth Circuit's admonition that "if the danger to the plaintiff existed prior to the State's intervention [or lack thereof], then even if the State

put the plaintiff back in that same danger, the State would not be liable because it could not have created a danger that already existed." *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 (10th Cir. 1998). Sgt. Raymer did not create or exacerbate any danger to Windle because she was in "no worse position than [she] would have been had [defendants] not acted at all." *DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006.

Moreover, the conduct at issue in *Currier* demonstrates the distinction between the present case, which involves a failure to protect, from the facts of *Currier*, where there was affirmative conduct undertaken which specifically placed a child at risk of harm. Anthony Juarez was scalded to death with boiling water by his father. Christopher Vargas, the child's father, had custody of his son. Tom Doran, a social worker, was responsible for removing the child from his mother's custody and placing him in his father's custody. Once the child was in Vargas' custody, Doran made visits to the home and noticed bruises on the child and was also informed by the child's guardian that Vargas and his fiancée were physically abusing the child. Doran did not investigate the bruises or the information about physical abuse. On three occasions during the late summer of 1993, the child's mother made allegations that the father and his girlfriend were abusing Anthony which included a specific accusation that the child was dunked in a bathtub full of water as punishment. Doran did not investigate the allegations. On October 19, 1993, Doran was responsible for the Children's Court's decision to grant Vargas legal custody, thereby placing the child in Vargas' home and removing him from his mother's home. Several months later, Vargas poured boiling water on his son, which ultimately led to his death.

The Court concluded that the plaintiffs alleged sufficient facts to support a claim under the state-created danger exception, relying heavily upon Doran's affirmative conduct in recommending that Vargas be given legal custody of the child, which conduct thereby placed the child at an obvious risk of harm at the hands of his father. 242 F.3d at 920.

Here, there is no such similar affirmative conduct by Sgt. Raymer that placed Windle at an obvious risk of serious and immediate harm at the hand of her abuser. In fact, Sgt. Raymer never had any direct contact with Windle or her abuser at any time until he confronted both and ended the abuse. Thus, the Tenth Circuit's articulation of the state-created danger test does not assist Windle. The result remains the same.

Windle also cites *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002), wherein the Court applied a two-prong test to determine whether a plaintiff falls within the narrow state-created danger exception: "(1) the state actors created or increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference." 309 F.3d at 322. However, Windle ignores the significant hurdles to establish deliberate indifference under this standard. In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1355, 155 L.Ed.2d 196 (2003), the Court held that to establish deliberate indifference the state actor must have knowledge of a risk to the victim's health and safety and disregard that risk for his conduct to rise to the level of deliberate indifference:

> To establish deliberate indifference, a state actor must know of and disregard an excessive risk to the [victim's] health and safety. The state actor's

> actual knowledge is critical to the inquiry. A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference. 305 F.3d at 326.

Windle argues that the Fifth Circuit's test differs from that of the Seventh Circuit in that the Seventh Circuit does not consider whether the state employee acted with deliberate indifference. However, under the deliberate indifference test articulated by the Fifth Circuit, Windle's claim fairs no better. The most that can be said is that Sgt. Raymer may not have perceived the actual risk to Windle. However, as the *McClendon* decision makes clear, this does not rise to the level of deliberate indifference.

Windle also cites *Schieber v. City of Philadelphia*, 320 F.3d 409 (3rd Cir. 2003) and *Estate Smith v. Marasco*, 318 F.3d 497 (3rd Cir. 2003) wherein the Third Circuit Court of Appeals adopted a four-part test for a state-created danger claim:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; [and] (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Windle latches on to the foreseeability element, arguing that had the Seventh Circuit considered this prong, she would have prevailed. Not so. Even if the harm to Windle was foreseeable, Sgt. Raymer had no relationship to her and nothing he did created or enhanced the

danger to Windle. Thus, the result would be the same in the Third Circuit as well

Although the Circuit Courts of Appeal do not employ identical standards for determining when the state-created danger exception applies, any minor distinctions do not warrant a grant of certiorari in this case. *DeShaney's* general rule applies with full force to the facts of this case, facts which plainly demonstrate nothing more than inaction by Sgt. Raymer. Regardless of which test or factors are considered, the result in this case is the same. Liability under the state-created danger theory is predicated upon affirmative acts by the state which either create a danger or increase the risk of exposure to danger. There is no affirmative conduct on the part of Sgt. Raymer which either placed Windle in a position of danger or exacerbated the situation, as correctly found by the Seventh Circuit Court of Appeals and the District Court. Mere inaction or failure to protect an individual from private acts of violence does not create liability under the Fourteenth Amendment. The factual scenario presented by this case simply does not rise to the level of that rare and exceptional circumstance where the narrow state-created danger exception applies.

B. The "Shocks The Conscience" Standard Is Inapplicable To A Failure To Protect Claim

Having determined that Windle "did not suffer a constitutional violation from the inaction of Raymer or any other police officer in Marion," the Seventh Circuit affirmed summary judgment on the failure to train claim asserted against the City of Marion as there was no underlying constitutional violation by Sgt. Raymer. 321

F.3d at 663. This was a correct result. In *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986), this Court held that a municipality cannot be held liable for an official policy or custom if it has been determined that the individual defendant did not violate the plaintiff's constitutional rights.

Although the facts of this case fall squarely within the parameters of *DeShaney's* rule that inaction by failing to protect a person from private harm does not give rise to a constitutional claim, Windle argues that the Seventh Circuit Court of Appeals erred in failing to consider whether she could premise a substantive due process claim against the City of Marion based upon the City's deliberate indifference to her situation which, in Windle's view, rises to a conscience-shocking level. Windle relies upon this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). In particular, Windle seizes upon the following language in *Lewis* to support her argument:

> "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853, 118 S.Ct. at 1720.

Lewis is inapplicable here as it applies only where government officials are under a recognized duty to act on behalf of the injured plaintiff. *Lewis* is not an alternative theory of liability where a plaintiff cannot demonstrate affirmative conduct by the government so as to fall within the narrow state-created danger exception.

Lewis comes into play only after the plaintiff demonstrates both a duty to act and affirmative conduct on the part of government actors. Only after a duty and affirmative

conduct is articulated by the plaintiff does any question arise as to whether that affirmative conduct taken is so egregious or outrageous as to shock the conscience. Sgt. Raymer and the City of Marion submit that *Lewis* has no application to failure to protect cases and cannot be utilized to make an end-run around *DeShaney*.

Indeed, in *Hernandez v. City of Goshen*, 324 F.3d 535 (7th Cir. 2003), the Seventh Circuit Court of Appeals recently decided that the *Lewis* "shocks the conscience" standard is inapplicable to a failure to act case. Jesus Hernandez and Ismael Garza were injured during a shooting spree in the workplace by a co-worker. The co-worker, Robert Wissman, got into a fight with another employee and threatened him with bodily harm. After Wissman left the plant, the supervisor called the local police department and spoke to an unidentified individual about the situation, indicating he feared for the safety of his employees. The supervisor was advised that the police department would not respond or get involved unless Wissman actually harmed someone. Wissman returned to the plant, shot and killed one employee, and injured Hernandez and Garza. They filed suit under 1983 alleging that the police department's conduct in not responding to the telephone call violated their substantive due process rights. The District Court dismissed the constitutional claims in reliance upon *DeShaney's* rule that a failure to protect an individual from private acts of violence does not rise to the level of a substantive due process violation.

On appeal, Hernandez and Garza argued that they were asserting a deliberate indifference, shocks the conscience substantive due process claim rather than a failure to protect claim. Rejecting their semantic gymnastics, the Seventh Circuit held that regardless of the words Hernandez and

Garza used to describe the City's conduct, the Complaint alleged liability under §1983 because the police department had a policy of not coming to the aid of persons who were at a foreseeable risk of harm and because its inadequate training of employees amounted to deliberate indifference. The Court held that the facts as pled did not establish a constitutional violation. In so doing, the Court rejected any application of the deliberate indifference standard or a shocks the conscience standard to a failure to protect claim:

> *First, neither Rochin nor Estelle nor Lewis is applicable here; in all of those cases and their progeny, §1983 liability arises from state action or inaction based on a recognized duty or affirmative course of conduct between the defendant state actor and the injured plaintiff. The critical difference in this case is that the City had no duty to the residents of Goshen to provide a police department whose policy is to investigate threats of violence, even credible ones, made by private persons and reported by private persons.* As the Supreme Court held in *DeShaney* and we recently reiterated in *Windle v. City of Marion, Indiana*, 321 F.3d at 660-61 (7th Cir. 2003), police departments have no constitutional duty to protect private persons from injuring each other, at least where the police department has not itself created the danger. Thus, no matter how egregious Hernandez and Garza might find the City's failure to investigate credible threats of private violence such as the one posed by Wissman, the City's conduct was not unconstitutional.
>
> Second, Hernandez and Garza had not presented any facts which would lead us to conclude that this case falls within the narrow "State-created

> danger" exception to *DeShaney*. We have recognized the possibility that a state actor might incur liability under §1983 if his or her conduct created or exacerbated the danger faced by the victim . . . .
>
> In this case, the pleadings allege that the Goshen Police Department learned from Nu-Wood plant manager Greg Oswald's phone call that employee Robert Wissman threatened to do bodily harm to Nu-Wood employees, and that Oswald knew Wissman had access to guns. No other evidence of the City's knowledge or involvement with the situation that Nu-Wood appears on the face of the complaint. This is even less information about the specific danger facing Hernandez and Garza than the police had in *Windle*, or the social workers had in *DeShaney*, and we therefore do not find that the City, through its police department's decision not to investigate the phoned-in threat, created or increased the danger faced by the Plaintiffs and their fellow Nu-Wood employees that day. 324 F.3d at 538-39 (Emphasis added) (Citations omitted).

The factual scenario in *Lewis* and its distinction from the facts here, demonstrates why a "shocks the conscience" test never applies in a failure to act situation. This Court granted certiorari in *Lewis* "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." 523 U.S. at 839, 118 S.Ct. at 1713. An innocent bystander died when a police patrol car skidded out of control during a high speed pursuit, striking a motorcycle and killing the passenger. In evaluating the proper substantive due process standard, the Court emphasized that "the touchstone of due process is protection of

the individual against arbitrary action of the government." *Id.* at 845, 118 S.Ct. at 1716. The Court warned that proving a substantive due process violation in a case involving government action is extremely unlikely as "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in a constitutional sense.'" *Id.* at 846, 118 S.Ct. at 1716.

This Court made clear that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 848, 118 S.Ct. at 1717. Rather, "conduct **intended to injure** in some way unjustifiable by any government interest is the sort of official action most likely to arise to the conscience-shocking level." *Id.* at 849, 118 S.Ct. at 1718. (Emphasis added). The Court also held that negligence is not enough to shock the conscience under any circumstance. *Id.* at 849, 118 S.Ct. at 1718. Windle fails to point to any evidence in the record which would even begin to suggest a deliberate intent to injure.

The key to *Lewis* is a duty to act coupled with deliberate and intentional action by the government. It is clear that Sgt. Raymer had no duty to act. Like the defendants in *Hernandez*, Sgt. Raymer was under no legal obligation to investigate the abuse by Rigsbee. The "shocks the conscience" standard should not be applied in this case merely because Sgt. Raymer had an opportunity to intervene sooner to stop the abuse. While it is disturbing that Rigsbee abused Windle, inaction by Sgt. Raymer neither created nor increased the danger to which Windle was already exposed. If Sgt. Raymer had never known of the abuse, the harm to Windle would have been the same or even greater. The fact that he learned of the abuse and

arguably did not intervene as soon as he might have creates no constitutional violation. As this case does not fall within the narrow confines of *Lewis*, there is no need for this Court to grant certiorari. The "shocks the conscience" standard applies only to the most egregious acts of intentional conduct in a situation where the government has a duty to act. As this is a failure to act case, *Lewis* has no application and Windle's misguided reliance upon *Lewis* does not provide an alternative basis for granting certiorari.

IV.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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